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IN THE UNITED STATES DISTRICT COURT**DISTRICT OF UTAH, CENTRAL DIVISION**THE SCO GROUP, INC., a Delaware
corporation,

Plaintiff,

vs.

NOVELL, INC., a Delaware corporation,

Defendant.

Case No. 2:04CV00139

**NOVELL'S OPPOSITION TO
SCO'S MOTION IN LIMINE NO. 3
RE NOVELL'S MONETARY
JUDGMENT AGAINST SCO**

Judge Ted Stewart

AND RELATED COUNTERCLAIMS.

SCO's motion in limine no. 3 ("Motion," Dkt. No. 646) seeks to preclude Novell from referencing a \$2.5 million dollar judgment entered against SCO by Judge Kimball; which is now, having been affirmed by the Tenth Circuit, final in every respect. SCO argues that reference to the judgment should not be allowed because the judgment is irrelevant and prejudicial.

SCO's Motion is the converse of Novell's own motion in limine no. 11. (Dkt. No. 636.) As explained in that motion and hereinbelow, the judgment *is* relevant because it goes to whether SCO performed its own obligations under the contract it is now attempting to enforce against Novell. Because the judgment is directly relevant, and SCO has not identified any prejudice substantially outweighing that relevance, SCO's Motion should be denied.

I. NOVELL'S \$2.5 MILLION DOLLAR JUDGMENT IS RELEVANT TO SCO'S FAILURE TO COMPLY WITH ITS OBLIGATIONS UNDER THE APA

As SCO recognizes, evidence is relevant if it has "any tendency to make the existence of any fact ... of consequence ... more probable or less probable." (Motion at 1.) Here, the judgment SCO seeks to exclude bears directly on facts material to SCO's own contract claims. Specifically, SCO maintains that it still has viable claims against Novell for (1) specific performance of, and (2) breach of the covenant of good faith and fair dealing inhering in, the APA. To prevail on either claim, SCO must prove that it performed its own obligations under the contract. Cal. Civ. Code § 3392 (specific performance); Judicial Council of Cal. Civ. Jury Instr. 303 (breach).¹ Novell's judgment against SCO establishes that SCO breached the APA—by modifying a legacy licensing agreement with Sun Microsystems without first consulting or even notifying Novell—*before* Novell committed any of the acts by which Novell allegedly breached.

¹ Section 9.8 of the APA chooses California law. The cited statute and jury instruction are reproduced in Exhibit 11A to Novell's motion in limine no. 11, Dkt. No. 636.

II. SCO FAILS TO DEMONSTRATE PREJUDICE OUTWEIGHING THE PROBATIVE VALUE OF THE JUDGMENT

Relevant evidence “may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice.” Fed. R. Evid. 403 (emphasis added). “‘Unfair prejudice,’ as used in Rule 403, does not mean the damage ... that results from the legitimate probative force of the evidence; rather, it refers to evidence which tends to suggest decision on an improper basis.” *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986).

“In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.” *Deters v. Equifax Credit Info. Servs. Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000) (internal quotations omitted). “The exclusion of relevant evidence under Rule 403 is ‘an extraordinary remedy to be used sparingly.’” *K-B Trucking Co. v. Riss Int’l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985) (citation omitted).

The only prejudice SCO alleges is speculation that the jury might be “improperly prejudice[d]” by the mere fact “that Novell has obtained the judgment.” (Motion at 1.) That speculative risk is not enough to outweigh the clear and direct relevance of key evidence that is central to Novell’s defense against SCO’s contract claims. *See also United States v. Boulware*, 384 F.3d 794, 808 (9th Cir. 2004) (“Any danger that the jury would have given undue weight to the ... judgment could have been dealt with by a cautionary instruction”); Fed. R. Evid. 403 advisory comm. note (“In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness ... of a limiting instruction”).

III. CONCLUSION

Because Novell’s judgment against SCO is directly relevant to whether SCO performed its own obligations under the contract it is asserting against Novell, and SCO has not identified any risk of prejudice substantially outweighing that clear and direct relevance, SCO’s Motion should be denied.

DATED: February 19, 2010

Respectfully submitted,

By: /s/ Sterling A. Brennan
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